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SERVICE DATE - OCTOBER 24, 2002

SURFACE TRANSPORTATION BOARD
Washington, DC 20423-0001

Docket No. AB-167 (Sub-No. 1095X)

**Consolidated Rail Corporation - Abandonment Exemption - Lancaster and Chester Counties,
PA**

Decided: October 15, 2002

NOTICE TO THE PARTIES:

In Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Bd., 252 F.3d 246 (3rd Cir. 2001) (FAST), the United States Court of Appeals for the Third Circuit vacated and remanded to the Surface Transportation Board (Board) a case involving the agency's historic review of a proposal to abandon 66.5 miles of track called the Enola Branch in Lancaster and Chester Counties, PA. The Board's decision to allow abandonment of rail service on the Enola Branch is unaffected by the court's remand. However, the court ruled that the Board failed to comply fully with the procedural requirements of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), when in 1997 and 1999 the Board denied the requests of the Friends of the Atglen-Susquehanna Trail, Inc. (FAST) to reopen and broaden the historic preservation condition imposed by the Board's predecessor, the Interstate Commerce Commission (ICC),¹ in a 1990 decision permitting Consolidated Rail Corporation (Conrail) to fully abandon the Enola Branch except for the bridges.

The Board's Section of Environmental Analysis (SEA) has reinitiated the section 106 historic review process pursuant to the court's remand. Since the court's decision, SEA has been working to bring the diverse parties with different interests together so that the Board can move the historic review process to completion in accordance with the law and the court's decision, as described further below.

SEA consulted with the Advisory Council on Historic Preservation (ACHP) and the Pennsylvania State Historic Preservation Officer (SHPO) while preparing this Notice to the Parties (Notice), and provided them with the opportunity to review and comment on the Notice prior to issuance. The Notice incorporates the comments of ACHP and SHPO received to date. The intent of this Notice is threefold: (1) to bring all consulting parties up to date on the background of the case; (2)

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, abolished the ICC and transferred certain rail functions, including the rail line abandonment functions at issue in this case, to the Board, effective January 1, 1996.

to describe the Board's reinitiation of the NHPA process and proposed next steps; and (3) to solicit comments on the five issues delineated at the end of this Notice.

I. Background

A. The NHPA. Before authorizing a rail line abandonment, the Board must comply with section 106 of the NHPA, which requires Federal agencies to consider the effects of their decisions on historic properties. ACHP has issued regulations implementing the NHPA. See 36 CFR Part 800. These regulations were revised in December 2000, and SEA is following the current ACHP regulations in the reinitiation of the NHPA process for this case.

The requirements of the NHPA are procedural in nature and do not require a particular result. See FAST, 252 F.3d at 263. NHPA establishes a three-step process under which the agency must consult with the appropriate SHPO and other consulting parties to determine: (1) which, if any, historic resources could be affected by the agency's action (Identification Phase); (2) whether those properties would be adversely affected by the agency's action (Assessment Phase); and, if so, (3) what conditions, if any, should be imposed to avoid, minimize or mitigate those adverse effects (Mitigation Phase). See 36 CFR 800.1(a).

During the Identification Phase, the agency must determine which properties that could be affected by the project are listed on or eligible for listing on the National Register of Historic Places (National Register). If the agency and the SHPO do not agree on this threshold eligibility question, or at ACHP's request, the agency must obtain an eligibility determination from an official in the Department of the Interior known as the Keeper of the National Register (Keeper).

During the Assessment Phase, the agency must determine whether the properties identified as historic will be adversely affected by the proposed abandonment. The general practice of the Board has been to assume that the abandonment of a rail line will negatively impact any properties involved that are identified as historic.

Finally, during the Mitigation Phase, the agency must develop appropriate mitigation measures to avoid, minimize or mitigate adverse effects on the historic properties so identified. Those measures must be crafted in consultation with the SHPO, ACHP, the railroad, and other consulting parties, with input from the public. The agency's mitigation plan is then formulated into a proposed Memorandum of Agreement (MOA), which, if agreed upon, is signed by the consulting parties. If no agreement on mitigation is reached, the consultation may be terminated, and the agency must request and take into account ACHP's formal comments prior to issuing a final decision.

B. This Case. The Enola Branch extends across Lancaster County, PA, from approximately milepost 27 (1 mile east of Safe Harbor, at the confluence of Conestoga Creek with the Susquehanna River) easterly to the Chester County, PA, line at milepost 4.03. A short portion of the Enola Branch

(between mileposts 4.03 and 0.0) lies in Chester County. The Enola Branch passes through the Townships of West Sadsbury, Sadsbury, Bart, Eden, Providence, Martic and Conestoga, and the Borough of Quarryville.

In 1989 Conrail sought authority from the ICC to abandon the Enola Branch pursuant to 49 U.S.C. 10903 and ICC regulations codified at 49 CFR 1152.50. The ICC issued a decision in 1990 allowing the abandonment subject to a condition, developed as a result of consultation with the SHPO, that Conrail retain its interest in, and take no steps to alter the historic integrity of, 83 bridges – the only properties on the line that had been identified as historic – until completion of the historic review process. The purpose of the condition was to allow the ICC to work with consulting parties to develop a plan to avoid, minimize, or mitigate any adverse effects of the abandonment on the bridges. The development of a mitigation plan was held in abeyance, however, pending negotiations to transfer the line for interim trail use/rail banking under 16 U.S.C. 1247(d) or other public use under former 49 U.S.C. 10906 (now 49 U.S.C. 10905). When those negotiations proved unsuccessful, the NHPA process was resumed.

Following extensive negotiations and consultations with Conrail and the Pennsylvania SHPO, SEA developed proposed historic preservation mitigation measures for the bridges. At the suggestion of the SHPO, Conrail would be required to document (to the level of Pennsylvania state standards) certain bridges prior to their removal, and to fund and furnish materials for a display relating to the Enola Branch in a transportation museum administered by the SHPO.

While this process was moving forward, FAST filed a petition with the Board to reopen the proceeding and broaden the NHPA condition so that it would apply to the entire line, rather than only the bridges on the line. The Board denied FAST's request in a decision issued in 1997. In that decision, the Board also narrowed the properties determined to be historic to 32 of the 83 bridges, in light of subsequent statements by the SHPO, and clarified that its condition embraced certain archeological sites.

FAST sought Board reconsideration of the 1997 decision. FAST also sought the involvement of ACHP. In a March 1998 letter, ACHP advised the Board of ACHP's determination that the Board had not fully complied with NHPA requirements for the first two stages of the historic review process for the Enola Branch. In the meantime, SEA, which believed that only the Mitigation Phase of the NHPA process for the bridges remained open, had consulted with the SHPO and Conrail on appropriate mitigation for the identified bridges. SEA drafted a proposed MOA reflecting that consultation,² which was sent to the SHPO, ACHP and Conrail for their signatures later in 1998.

² The MOA would have provided for photographic documentation of all of the historic bridges and the development of a public, interpretative display, in the form of a 6-8 minute video, outlining the history of the Enola Branch.

The SHPO declined to sign the MOA until the Board consulted with ACHP. ACHP, in turn, explained that it believed that its consideration of the draft MOA was untimely, as the draft MOA could be properly considered only after the issue of whether the entire line should be subject to an historic review was resolved. ACHP then formally referred the eligibility matter to the Keeper, who concluded that the entire Enola Branch was eligible for inclusion in the National Register.³ Nevertheless, in 1999 the Board denied FAST's petition for reconsideration of the 1997 decision. The Board set out its view that the Identification Phase of the NHPA process had been completed in 1990 for the non-bridge parts of the line and that only the Mitigation Phase remained open and only as to the bridges. Given the impasse with ACHP, which had declined to comment on bridge mitigation, the Board decided to terminate its consultation with ACHP and to impose a section 106 condition consisting of the provisions of the unexecuted MOA as its bridge mitigation measures. FAST then sought judicial review.

C. The Court's FAST Decision. The court's concern that resulted in the remand was "less with the substantive results reached by the [Board] on the historic eligibility of the Enola Branch than with the procedures and reasoning the [Board] followed in reaching those results." The NHPA is a "stop, look, and listen" provision, and the court concluded that the Board had not "touched all the procedural bases." FAST, 252 F.3d at 263.

With respect to the Board's actions in the Identification Phase, the court found that the identification process under the ACHP regulations is a "fluid and ongoing one" in which changing perceptions of historical significance are considered. Id. Therefore, the court determined that, once ACHP brought the Keeper into the process, the Keeper's conclusions had to be considered. Id. at 264. The court was not persuaded that the Board had given the Keeper's determinations sufficient consideration. Id. The court also faulted the Board for not adequately involving ACHP in the process or considering evidence submitted by other parties (specifically Lancaster County) regarding the historic significance of the Enola Branch. Id. at 265-66. Finally, the court found that the Board had not followed the proper procedures for terminating consultation with ACHP, id. at 266-67, and directed that, on remand, the Board follow the procedures of the NHPA regulations in concluding the case, id. at 267.

II. Reinitiation of the NHPA Section 106 Process

In accordance with the court's remand, SEA is conducting the NHPA process anew in this case. Below, SEA sets forth the steps it has taken to date and outlines its plans to complete this proceeding.

³ The SHPO also had written a letter to the Pennsylvania Department of Transportation to the same effect.

A. Identification of Potential Consulting Parties. SEA has undertaken consultations with ACHP, the SHPO, and other consulting parties, including the Commonwealth of Pennsylvania and the Lancaster County Planning Commission, to obtain information both on how to conclude the NHPA process here and on potential consulting parties. In addition to ACHP and the SHPO, SEA has identified 51 potential consulting parties.⁴ SEA is serving a copy of this Notice on each of these parties, and will publish this Notice in the Federal Register to alert any additional consulting parties to the opportunity to take part in the ongoing NHPA process.

B. Identification Phase. As stated above, the identification of historic properties is the first phase of the section 106 process. As noted, in this case the Keeper has determined that the entire line

⁴ These potential consulting parties include: parties previously involved in the case (Norfolk Southern Corporation, FAST, and the Keeper); members of Congress (Honorable Arlen Specter, United States Senate; Honorable Rick Santorum, United States Senate; and Honorable Joseph R. Pitts, United States House of Representatives); state leaders and agencies (Honorable Mark Schweiker, Governor; Pennsylvania Department of Transportation; Pennsylvania Public Utility Commission; Pennsylvania Bureau of State Parks; and Pennsylvania Department of Conservation and Natural Resources); tribes (Absentee-Shawnee Tribe of Oklahoma; Cayuga Nation; Delaware Nation, Oklahoma; Delaware Tribe of Indians, Oklahoma; Eastern Shawnee Tribe of Oklahoma; Oneida Indian Nation; Oneida Tribe of Indians of Wisconsin; Onondaga Indian Nation; Seneca Nation of Indians; Seneca-Cayuga Tribe of Oklahoma; St. Regis Mohawk Tribe; Stockbridge-Munsee Community of Wisconsin; Tonawanda Band of Seneca Indians; and Tuscarora Nation); local agencies and organizations (Atglen Borough, Chester County Planning Commission, Chester County Parks and Recreation Department, Delaware Valley Regional Planning Commission, Lancaster County Planning Commission, Lancaster County Department of Parks and Recreation, Bart Township Supervisors, Bart Township Planning Commission, Conestoga Township Supervisors, Conestoga Township Planning Commission, Eden Township Supervisors, Eden Township Planning Commission, Martic Township Supervisors, Martic Township Planning Commission, Parkesburg Borough, Providence Township Supervisors, Providence Township Planning Commission, Quarryville Borough Council, Quarryville Borough Planning Commission, Sadsbury Township Supervisors, Sadsbury Township Planning Commission, West Sadsbury Township Supervisors, and West Sadsbury Township Planning Commission); historic preservation organizations (Chester County Historic Preservation Network, Preservation Pennsylvania, Historic Preservation Trust of Lancaster County, and Central Pennsylvania Conservancy); Amtrak; and the Law Firm of Malatesta Hawke & McKeon LLP.

is historic,⁵ rather than only selected bridges and archeological sites.⁶ Therefore, SEA will treat the entire line as historic in accordance with the Keeper's determination and the ACHP regulations.

C. Assessment Phase. As stated above, the Board generally assumes that abandonment of a rail line would adversely impact any properties involved that are identified as historic, unless it obtains evidence that there would be no adverse effect, and both ACHP and the SHPO agree with the Board that abandonment of the Enola Branch would adversely affect historic sites and structures.

D. Mitigation Phase. In order to develop appropriate mitigation, SEA requests additional information from all consulting parties regarding the physical condition of the Enola Branch. After the court issued its decision in FAST, SEA requested a description of the current condition of the rail line from Norfolk Southern Corporation (NS), which acquired the Enola Branch from Conrail in 1998.⁷ NS submitted a letter stating that the road bed and embankments of the rail line are still intact, though there is substantial overgrowth in the area. While NS indicated that the Enola Branch has been subject to periodic inspections for right-of-way clean up and Amtrak's maintenance of certain power lines, NS stated that there has been no comprehensive inspection of the rail line and associated structures in the last 10 years.

The Enola Branch originally included 83 bridges, prior to Conrail's application for abandonment. In its letter, NS stated that approximately 65 grade-separated structures on the line remain in place and are in different states of usability. According to NS, the Pennsylvania Public Utility Commission has served orders for removal, conveyance to local municipalities, or assumption of maintenance responsibilities by the Commonwealth of Pennsylvania, regarding bridge structures on the rail line.

⁵ Evidently, little if any track remains on the Enola Branch. However, in this case, "the historical eligibility of the line as a whole does not require the presence of the tracks and other railroad equipment." See FAST, 252 F.3d at 262.

⁶ As explained above, the historic preservation condition imposed in the Board's 1997 decision covered only certain bridges and archeological sites on the Enola Branch.

⁷ On June 23, 1997, NS and CSX Transportation Inc. sought permission from the Board to acquire Conrail and to divide its assets between them. On July 23, 1998, the Board approved the Conrail Acquisition. CSX Corp., et al. & Norfolk Southern Corp., et al. – Control and Operation Leases/Agreements – Conrail Inc., et al., STB Finance Docket No. 33388 (decision No. 89) (STB served July 23, 1998). The Pennsylvania Rail Lines LLC, a subsidiary of Conrail, now owns the Enola Branch and leases it to NS.

As the ICC explained in its decision adopting the rules that continue to govern the Board's implementation of the NHPA,⁸ the agency's ability to protect historic properties is very limited. The Board cannot deny authority for a railroad to take an action that would otherwise meet the relevant statutory criteria solely on the ground that it would adversely affect historic resources. Moreover, with respect to rail line abandonments, the Board can impose historic preservation conditions only to the extent that the particular property is owned by the railroad seeking abandonment (either full ownership in fee or a long-term interest in the property) and the property has a sufficient nexus to the proposal under review. When the Board imposes historical preservation conditions on particular property, the Board cannot force the applicant to sell or donate its property, or impose a restrictive covenant upon the deed. Essentially, documentation of the historic resources (taking photographs or preparing a history) before they are altered or removed is the only form of nonconsensual mitigation the Board can require. Although the Board has limited authority to protect historic properties, if the consulting parties agree to undertake additional mitigation beyond what the Board may require (such as preservation of a resource), such consensual mitigation can be incorporated in the MOA.

As stated above, in the 1990's a proposed MOA was developed for the Enola Branch that would have provided for photographic documentation of all of the historic bridges to Pennsylvania's state standards, and the development of a public, interpretative display, in the form of a 6-8 minute video, outlining the history of the Enola Branch. SEA specifically requests comments on whether the provisions of this previously developed MOA proposal would constitute appropriate mitigation at this time and, if not, suggestions for additional or alternative mitigation measures.

E. Formulation of an MOA. Based on public comment in response to this Notice and other input that SEA receives from the SHPO, ACHP, the railroad and others, SEA expects over the next several months to develop, in conjunction with the consulting parties, appropriate measures to avoid, minimize, or mitigate adverse effects on the historic properties identified in this case. After such mitigation measures have been determined, SEA will incorporate the proposed mitigation into an MOA and then circulate, and – as required under the law – seek public comment on the MOA. SEA requests comments on how it can best publicize the proposed MOA. Once an MOA is signed, the NHPA review in this case will be complete in accordance with the NHPA and the court's decision, and the section 106 condition imposed in this case can be removed.⁹

⁸ See Implementation of Environmental Laws, 7 I.C.C.2d 807, 828-29 (1991).

⁹ Agency officials and consulting parties can expedite the section 106 process by addressing multiple steps simultaneously where appropriate, as long as the consulting parties and the public have an adequate opportunity to express their views and the SHPO (and Tribal Historic Preservation Officer(s), when involved) agree that it is appropriate. See FAST, 252 F.3d at 252; 36 CFR 800.3(g).

III. Comments

SEA specifically invites comments from consulting parties and members of the public on the following:

1. Identification of additional consulting parties;
2. Any need for further assessment of adverse effects on the line;
3. Appropriate mitigation measures (including comments on the measures specified in the earlier MOA and suggestions for additional or alternative measures, as well as information regarding the current condition of the rail line);
4. Methods or outlets for publicizing a proposed MOA; and
5. Any other pertinent issues relevant to this proceeding.

If you wish to file comments regarding this Notice, you should send an **original and two copies** to Surface Transportation Board, Case Control Unit, Washington, DC 20423, to the attention of Troy Brady. **Please refer to Docket No. AB-167 (Sub-No. 1095X) in all correspondence addressed to the Board.** If you have questions regarding this Notice, you should contact Troy Brady, the environmental contact for this case, by phone at (202) 565-1643 or by fax at (202) 565-9000. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

Date made available to the public: October 24, 2002.

Comment due date: December 9, 2002.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams
Secretary